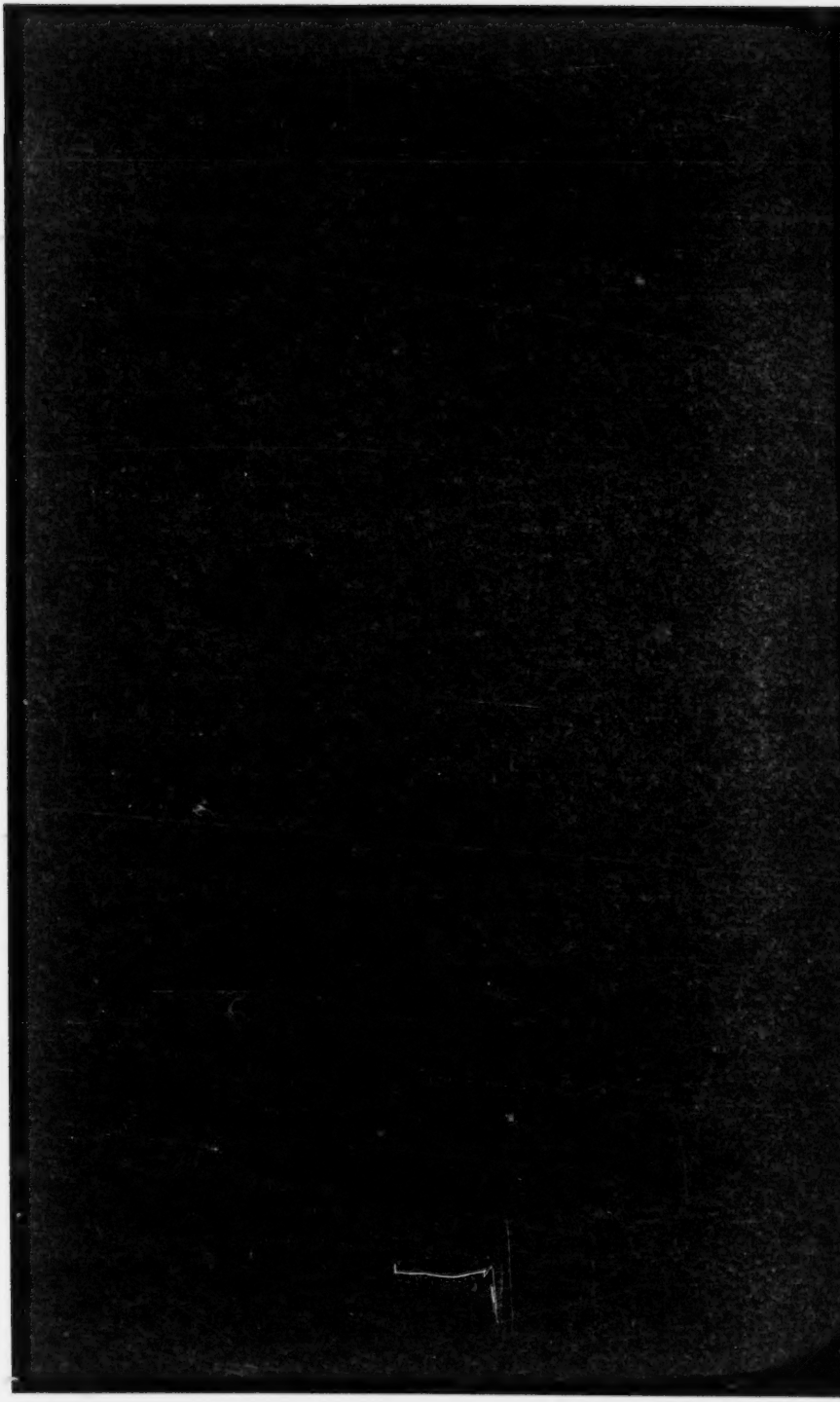

# In the Supreme Court of the United States

OCTOBER TERM, 1923

THOMAS W. MILLER, AS ALIEN PROPERTY Custodian, and Frank White, as Treasurer of the United States, Petitioners,

*v.*

BENJAMIN GUINNESS, WALTER T. ROSEN, Moritz Rosenthal, Sidney H. March, Rudolph Metz, and Harry B. Lake, and Anna Thalmann and Moritz Rosenthal, as trustees of the Estate of Ernst Thalmann, deceased, copartners doing business under the firm name and style of Ladenburg, Thalmann & Company, respondents } No.

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF**

The Solicitor General on behalf of Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States of America, petitioners, prays that a writ of certiorari issue in accordance with the provisions of Section 251 of the Judicial Code, to review the decree of the Circuit Court of Appeals for the Second Circuit, entered in

this case on April 21, 1924, which affirmed a decree of the District Court of the United States for the Southern District of New York in favor of the respondents and against the petitioners.

### QUESTION PRESENTED

Where a debt is owing to a person in currency of a foreign country and suit is brought in a court in the United States to recover the amount of the debt, what rate of exchange should be used by the Court in transmuting into money of the United States for the purpose of entering a decree or judgment the amount of the debt which is expressed in foreign currency?

### STATEMENT OF THE CASE

On April 6, 1917, the date of the outbreak of war between the United States of America and Germany, Delbruck, Schickler & Company, a German firm domiciled in Germany, was indebted to the respondents in the sum of M. 1,079.35, as shown by an account stated, dated December 31, 1916, and duly acknowledged by Delbruck, Schickler & Company.

The respondents conceded a separate indebtedness to Delbruck, Schickler & Company of $35.35. On or about December 1, 1921, the respondents instituted a suit in equity under the terms and provisions of Section 9 of the Trading with the Enemy Act, 41 Stat. at L. 911, in which suit the respondents sought to have paid to them the amount of said debt out of money or other property in the custody of these petitioners which had been seized as the money

or other property of Delbruck, Schickler & Company, which had become an enemy under the provisions of the Trading with the Enemy Act.

The only questions which arose in the District Court were questions of law, namely, (1) what rate of exchange should the Court adopt in transmuting the amount of the enemies' indebtedness in marks into money of the United States, and (2) were the respondents entitled to interest upon the indebtedness owing by Delbruck, Schickler & Company, during the period between April 6, 1917, and July 14, 1919, the first date being the date of the outbreak of war between the United States of America and Germany, and the second date being the date of the issuance of the general license by the War Trade Board permitting communication and commercial transactions between the citizens of the United States of America and citizens of Germany.

The District Court, against the insistence of the petitioners that the rate of exchange to be adopted was the rate of exchange as of the date of the final decree, held that the rate of exchange to be used should be the rate at the date of the breach of contract to pay the indebtedness, namely, December 31, 1916. The District Court sustained the contention of the petitioners that no interest should be allowed upon the indebtedness between the dates mentioned. A decree was entered pursuant to the decision of the Court and upon appeal to the Circuit Court of Appeals for the Second Circuit, the decree of the District Court was affirmed in both particulars.

## STATUTE INVOLVED

Section 9 of the Trading with the Enemy Act, 41 Stat. at L. 911, pursuant to which the suit was instituted by the respondents in the District Court, in so far as relevant here, is as follows:

> That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States * * * may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides * * * (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant) to establish the interest, right, title, or debt so claimed, and if so established the Court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or the interest therein to which the Court shall determine said claimant is entitled.

## REASONS FOR GRANTING THE PETITION

(1) There are now pending in the various courts numerous suits against these petitioners in which the same question of law is involved as is involved in this case.

(2) The decisions upon the question involved are not in accord, and it is desirable that this Court decide the question, in order that the numerous other suits may be expeditiously disposed of.

(3) There are now pending before the President and before the Alien Property Custodian and the Attorney General of the United States, to whom has been delegated certain powers of the President under the Trading with the Enemy Act, applications for the allowance of numerous claims filed by American citizens, pursuant to the provisions of Section 9 of the Trading with the Enemy Act, in which the applicants seek to have indebtednesses owing them in foreign currency paid out of funds in the possession of the petitioners, and the petitioners in passing upon such claims are hampered by the conflict in the decisions upon the question involved here.

JAMES M. BECK,
*Solicitor General.*

## BRIEF IN SUPPORT OF THE PETITION

**The district court, in calculating the amount of the enemy's indebtedness in United States money, should have adopted the rate of exchange existing at the date of the entry of the final decree.**

This question arises principally because a court in the United States can not enter a decree or judgment in foreign money. This principle has long been established. *The Edith* (1871), Fed. Cas. No. 4281; *Erlanger* v. *Avengno*, 24 La. Ann. 77; *Bronson* v. *Rodes* (1868), 7 Wall. 229; *Butler* v. *Horwitz*, 7 Wall. 258.

The fact that the amount of the decree here must be stated in dollars is a mere incident to the rights and liabilities of the parties. The real question is what the parties agreed to do. It is quite clear that the enemy defendants agreed only to pay a specific number of German marks. Had the Germans tendered the plaintiffs prior to suit the number of marks called for by their obligation, plaintiffs would have been obliged to receive these marks in discharge of the obligation of the enemies. The enemies could not have been penalized, practically speaking, for failure to pay the debt on the day it was due. It is quite true that where a debt is due on a particular date and is not paid at that time, any subsequent payment is in the nature of damages, but in the case of debts for specific sums of money these damages are merely nominal. Chitty in his Treatise on Pleading, 16th edition, vol. 1, p. 121, says, with respect to actions of debt:

> This action is so called because it is in legal consideration for the recovery of a *debt eo nomine* and *in numero;* and though *damages* are in general awarded for the detention of the debt, yet in most instances they are merely nominal, and are not, as in assumpsit and convenant, the principal object of the suit; and though this distinction may now be considered as merely technical, where the contract on which the action is founded is for the payment of money, yet in many instances we shall find it material to be attended to.

The only recompense which the law recognizes for the failure to pay the amount of this debt is the payment of interest.

The authorities upon this question can not be said to be uniform. There would seem to be four possible rates of exchange which could be adopted for transmuting the amount of a debt in foreign currency into currency of the United States: (1) the rate of exchange prevailing on the date the payment should have been made or the cause of action accrued, or (2) the rate of exchange prevailing on the date the suit for the recovery of the debt is commenced, (3) the rate of exchange prevailing on the date the verdict or judgment is entered, or (4) the rate of exchange prevailing on the date the judgment is paid or execution made thereon. See Columbia Law Review, vol. 22, p. 217. The second and fourth suggested rates of exchange can be eliminated at once, as most of the authorities do eliminate them. The second suggestion is hardly tenable, since the com-

mencement of suit means nothing more than the submission of the dispute for determination by a properly authorized tribunal and to have put upon the obligation the official stamp of the State. The fourth suggested rate of exchange can hardly be adopted, since prior to the date of the payment of the judgment or the execution thereon the old obligation has already been translated at the date of the entry of the judgment into an obligation payable in money of the United States, and the judgment could not have been entered in any other money. Hence, prior to the date of execution the old obligation had been merged in an obligation payable in currency of the United States.

The question then reduces itself to one as to whether the rate of exchange prevailing at the date of the failure to pay, or breach of contract, should be used, or the rate at the date when the judgment is entered. Prior to the Great War the authorities were few and were far from satisfactory. However, the question had protruded itself enough to cause comment by one of the great text writers of the nineteenth century. Justice Story, in his Conflict of Laws, 7th edition, Section 308, in commenting upon the principle laid down in the case of *Lee* v. *Wilcocks*, 5 Sergeant & Rawle (Pa.), 48, says:

> In a late American case, where the payment was to be in Turkish piasters, but it does not appear from the report where the contract was made or may be payable, it was held to be the settled rule "where money is the object of the suit to fix the value according

> to the rate of exchange at the time of the trial." It is impossible to say that the rule laid down in such general terms ought to be deemed of universal application, and cases may be easily imagined which may justly form exceptions.

In the case of *Grant et al.* v. *Healey* (1839), Fed. Cas. No. 5696, which was decided by Mr. Justice Story, the learned text writer apparently adopted the rate of exchange prevailing at the date of judgment.

Justice Story goes on the assumption in this case that the creditor of a foreign debtor is to be compensated for the delay in the payment of the obligation not by having imposed upon the debtor a new obligation to pay something he did not agree to pay but by having awarded to him interest for the period of the delay. See also *Cropper* v. *Nelson*, Fed. Cas. 3417; *Smith* v. *Shaw*, Fed. Cas. 13107.

Perhaps the leading case upon the subject prior to the time when the questions as to rate of exchange became acute was a case decided by the Supreme Court of Wis. *Hawes* v. *Woolcock*, 26 Wis. 629.

See also *Lee* v. *Wilcocks*, 5 Sergeant & Rawle; *Robinson* v. *Hall*, 28 How. Prac. 342. In *Scott* v. *Hornsby*, 1 Call. (Va.) 35, the Court said:

> As to the other point (i. e., the rate of exchange) the sterling money was properly settled at the time of the judgment, because the rate of exchange was liable to fluctuation and therefore should be ascertained at the time when the plaintiff is to get his money.

See also *Comstock* v. *Smith*, 20 Mich. 338; *Murphy* v. *Camac*, Fed. Cas. 9948; *The Blohm*, Fed. Cas. 1556; *Marbury* v. *Marbury* (1866), 26 Md. 17.

It would seem, therefore, that prior to the Great War the weight of authority in the United States was that the rate of exchange prevailing at the time of judgment was the proper one to be adopted in calculating the amount of a judgment in United States money where the obligation sued upon was payable in foreign money.

The earlier English decisions seem to be as much confused as the American. The earliest case which has been found which could possibly have any bearing upon the subject is that of *Elkins* v. *East India Company* (1717) 1 P. Williams, 395.

The entire judgment reads as follows:

> Let the master see what was the interest on money during these years in the Indies and what is the charge of returning money from the Indies to England, and he is to allow Indian interest, deducting out of it the charge of returning.

The use of the present tense by the court when it says that the master is to ascertain what *is* the charge of returning money from the Indies to England would seem to mean the charge at the time judgment was entered.

See *Scott* v. *Beavan*. 2 Barn. & Adolphus 78.

Coming down to more modern decisions, the last English case upon the subject prior to the very recent cases, which will be discussed presently, was

the case of *Manners* v. *Pearson* (1898), Ch. Div. 581. In view of the fact that the *Manners case*, in its proper interpretation, clearly lays down the rule that the rate of exchange prevalent at the date of judgment is to be adopted under circumstances such as the present, and in view of the still further fact that the English courts, including the House of Lords, have been at great pains in their endeavors to distinguish the *Manners case* from recent cases in which they have decided contrary to the *Manners case*, it will be interesting to examine that case somewhat carefully.

In the *Manners case* the decision was by a court divided two to one. The recent English cases have referred more to the opinion of the minority, Judge Vaughn Williams, than to the majority opinion. This is due to the fact that the English courts in the recent English cases have not desired to follow the majority opinion, but they hesitated flatly to overrule it. That case was an action for a breach of contract to pay for labor. The contract dated October 6, 1891, was entered into in Mexico between the plaintiff's deceased and the defendants. The plaintiff's deceased signed the contract in Mexico and the defendants in London. By it the defendants agreed to pay the deceased (1) the sum of £595 17s. 6d., in English money, on the execution of the agreement, and (2) one cent in Mexican currency for every cubic meter of certain excavation works mentioned in the agreement, which money was payable from time to time as and when the same should be received by the defendants from the Junta or Committee of Man-

agement of the drainage works of the city and valley of Mexico. The sum to be paid upon the execution of the contract was duly paid. The other sums, however, provided for under the second portion of the contract were not paid.

On June 11, 1896, the personal representative of the deceased brought an action for account. The action did not come on for trial until November 4, 1897. The defendants kept their accounts in Mexican dollars. On November 13, 1897, in order to avoid having the account taken in chambers, the defendants delivered an account showing that a balance of $19,366 in Mexican currency was due to the estate represented by the plaintiff on August 31, 1896, which sum they offered to pay in dollars or in English currency equal to the value of the dollars on November 13, 1897. The plaintiff in the case contended that the balance due on the account ought to be turned into English money on August 31, 1896, when the account was completed. At that date the Mexican dollar was worth 2s. 6d. The defendants, on the other hand, contended that the balance ought to be turned into English money on November 13, 1897, when the actual amount was first ascertained and when the dollar was worth only 1s. 6¼d. The court found in favor of the contention of the defendant, and this was affirmed on appeal.

The recent American decisions are not in accord upon this question. There are a number of decisions holding that the proper rate of exchange to adopt under circumstances such as the present is the rate

at the date of judgment or decree. There are others which hold that the rate as of the date of the breach of contract or the date the cause of action accrued is the proper rate. In the latter cases the decisions are for the most part a result of a blind following of the case of *Owners of S. S. Celia* v. *Owners of S. S. Volturno*, 1921, L. R. 2 App. Cas. 544, decided by the House of Lords, and which was a case sounding in tort. This case will be discussed later.

In *The Hurona*, 268 Fed. 910, decided in the District Court of the United States for the Southern District of New York by Judge Augustus N. Hand on April 3, 1920, where certain advances had been made to the master of a vessel amounting to 119,007.65 francs between June 3 and July 12, 1919, the court held that in a proceeding instituted in rem to recover the amount of the advances the rate of exchange prevailing at the date of the entering of the decree should be adopted. The court in reaching its decision cited the case of *Grant* v. *Healey*, *supra*, and *Hawes* v. *Woolcock*, *supra*.

On the same day in the same court the same judge handed down a decision in the case of *The Verdi*, 268 Fed. 908, where the suit was to recover damages for a collision off quarantine anchorage, Staten Island, New York, on September 21, 1915. The vessels were each British owned. The temporary repairs and expenses in New York were $1,509. The permanent repairs and expenses were incurred in England, and were paid for there on or about January 1,

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1915, in British currency, amounting to £1,791.2.6. The demurrage in New York and England occasioned by the collision amounted to £6,478.0.9 The Commissioner converted these sums into American dollars at $4.74 per pound sterling, the rate of exchange on January 1, 1916, the date upon which it was apparently assumed by the parties that all the damages were ascertainable. Judge Hand in deciding the case had before him the correctness of the commissioner's ruling as to the rate of exchange. The question was whether the rate of exchange should be the rate determined by the commissioner or the rate at the time of the entry of the decree. Judge Hand confirmed the commissioner's report.

These two cases, being decided by the same court on the same date, are interesting in that the court reaches one conclusion in the case where damages in tort are sought to be recovered and another conclusion in a case in which it is sought to recover the amount of a debt. Judge Hand, with one exception, is the first judge to recognize the distinction in such cases as these between actions in tort and actions for the payment of debts, and it is because of the failure of the courts to recognize these distinctions and an apparent desire to prevent loss by persons who have dealt in foreign currency, which has depreciated, that has led the courts astray.

In the case of *Page* v. *Levenson et al.*, 281 Fed. 555, decided by Judge Rose in May, 1922, in the United States District Court for the District of Maryland,

it was held that the rate of exchange to be used in calculating an amount due in French currency is the rate prevailing at the time of breach of contract. Judge Rose based his decision largely upon the decision of the House of Lords in the case of *S. S. Celia* v. *S. S. Volturno, supra*. The Judge himself recognized the difficulties involved and that it was practically an impossibility to answer the contrary contentions.

The decision in the *Page case* is of little assistance in a discussion of the proposition involved. In *Liberty National Bank of New York* v. *Burr*, in the District Court of the United States for the Eastern District of Pennsylvania, 270 Fed., 251, an action was brought at law in assumpsit, and the question came up on a rule for want of a sufficient affidavit of defense. The suit was on a bill of exchange drawn and accepted in London, and made payable there in pounds sterling. It was held that leave to the plaintiff would be granted to move for judgment on a sum based on the rate of exchange prevailing at the time judgment was entered.

The history of the subject in the New York State courts is far from satisfactory. In the case of *Gross* v. *Mendel*, 171 App. Div. 237, decided by the appellate division of the Supreme Court in 1916, and affirmed in a memorandum opinion by the Court of Appeals, 225 N. Y. 633, the Court held that in an action brought to recover upon an acceptance of a bill of exchange drawn by and payable to the plain-

tiffs at Leipsig, Germany, for a certain number of marks, plaintiff was entitled to recover in United States money a sum sufficient to have purchased the marks at the time the defendant agreed to pay them.

It will be noted that this case was decided upon the so-called re-exchange theory. On the other hand, in the case of *Sirie* v. *Godfrey*, 196 App. Div. 529, decided by the Appellate Division of the Supreme Court in April, 1921, the court held that in a suit to recover for the amount of goods sold, the bill having been rendered in francs, the rate of exchange to be taken should be the rate prevailing at the time of the trial. It is interesting to note the following expression of the court:

> The purchase price of the goods in question was not payable in American dollars nor was it payable in German marks. It was payable in French francs, and by merely bringing action in this jurisdiction the plaintiff, I apprehend, acquired no right to a more favorable judgment than she could have obtained had action been brought in France.

On page 537 of the opinion the court distinguishes the case of *Gross* v. *Mendel*, *supra*.

The most recent expression of the New York courts is found in the case of *Hoppe* v. *Russo-Asiatic Bank*, 200 App. Div. 460, decided by the appellate division of the Supreme Court in March, 1922, and affirmed in a memorandum opinion by the Court of Appeals in 235 N. Y. 37. This action was brought to recover a debt payable in pounds. The court relied

upon *Gross* v. *Mendel, supra.* The case went to the Court of Appeals on the question of the proper rate of exchange, and the court in a memorandum opinion simply held:

> In an action properly brought in the courts of this state by a citizen or an alien to recover damages, liquidated or unliquidated, for the breach of contract or for a tort where primarily the plaintiff is entitled to recover a sum expressed in foreign money, in determining the amount of the judgment expressed in our currency, the rate of exchange prevailing at the date of the breach of contract, or at the date of the commitment of the tort is, under ordinary circumstances, to be applied.

The English case upon which all proponents of the proposition that the rate of exchange prevailing at the date of breach of contract or the accrual of the action should be adopted is *Owners of S. S. Celia* v. *Owners of S. S. Volturno* (1921), L. R. 2 App. Cas. 544. In that case the action arose out of a collision which occurred in the Mediterranean Sea between the English steamship *Celia* and the Italian steamship *Volturno.* The trial court held both ships equally to blame and referred the question of damages to the registrar. The cross-claims for damages were agreed subject to a question raised by the owners of the *Volturno* as to one item of their claim which was calculated in lire as to the rate of exchange. The question was whether in calculating the amount

which the respondents, the owners of the *Volturno*, were entitled to recover from the appellants, the owners of the *Celia*, in respect to damages for the use of their vessel the rate of exchange to be taken should be taken at the time the loss was incurred or at the time of the assessment or payment. The trial court held that the rate of exchange in respect of the claims for detention should be fixed as at the periods of detention. This was affirmed by the Court of Appeal and upon appeal to the House of Lords the appeal was dismissed, four of the justices holding in favor of the rule that the rate should be fixed as of the periods of detention and one justice dissenting.

It is to be noted that this was an action sounding in tort and may well be distinguishable from actions for the payment of simple debts.

In *Lebeaupin* v. *Crispin & Co.*, (1920) 2 K. B. D. 714, the court held that the damages assessed at $12,500 were payable in London at the rate of exchange existing upon the date of the breach of contract. This was an action brought to recover damages for failure to deliver goods. To the same effect as to damages for breach of contract to deliver goods, see *Di Ferdinando* v. *Simon, Smits & Co.*, decided in 1920 by the Court of Appeal (1920), 3 K. B. D. 409. These are the leading cases for the facts which they cover.

The case of *Société des Hôtels du Touquet-Paris-Plaza* v. *Cummings* (1921), L. R. 3 K. B. D. 459,

seems to be *contra* to the decision of *S. S. Celia* v. *S. S. Volturno, supra*.

The learned Judge of the District Court held that if a debt was not paid when due, payment thereafter was not a payment of the debt but a payment of damages for failure to pay the debt. This, of course, is resorting to very technical grounds. If, however, technical grounds are to be employed in reaching the results, the reasons should be technical throughout, and not technical as they seem to do moral justice. The difficulty with the learned judge's decision in the lower court upon this proposition is that he failed to take into consideration, as the judges in the Société des Hôtels case did, namely, that damages for failure to pay a debt are merely nominal and that the proposition that the suit to recover a debt is not a suit to recover the money owed, but to recover the damages incurred by reason of the failure of the debtor to pay, may not be used as a ground for permitting the plaintiff to recover more than the defendant agreed to pay.

In the present case the defendant agreed to pay 1,079 marks. Had the plaintiffs been in Germany at any time and had the defendants tendered them 1,079 German marks they could not have refused to accept them. Merely because the suit is brought in a court of the United States where the court is compelled by reasons based fundamentally on policy to give judgment in money other than the money in which the debt was incurred should not operate to

compel the debtor to do something he did not agree to do.

For the foregoing reasons it is respectfully submitted that the petition shall be granted.

JAMES M. BECK,
*Solicitor General.*

DEAN HILL STANLEY,
*Special Assistant to the Attorney General.*

MAY, 1924.

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No. [redacted]

IN THE

# Supreme Court of the United States

OCTOBER TERM, [redacted] 1925

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BENJAMIN GUINNESS, WALTER T. ROSEN, MORITZ ROSENTHAL, SIDNEY H. MARCH, RUDOLF METZ AND HARRY B. LAKE, AND ANNA THALMANN AND MORITZ ROSENTHAL, AS TRUSTEES OF THE ESTATE OF ERNST THALMANN, DECEASED, COPARTNERS DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF LADENBURG, THALMANN & CO.,

*Petitioners,*

*against*

THOMAS W. MILLER, AS ALIEN PROPERTY CUSTODIAN, FRANK WHITE, AS TREASURER OF THE UNITED STATES AND CARL JOHNCKE, GUSTAV RATJEN, LUDWIG KORTE, ARTHUR FREIHERR VON SCHICKLER, MARGARETE GRAFIN VON POURTALES, ESTATE OF LUDWIG DELBRUCK, DECEASED, COPARTNERS DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF DELBRUCK, SCHICKLER & COMPANY,

*Respondents.*

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## PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Law Reporting Post Job Printing Offices, Inc., 154 Fulton St., New York, N. Y.

IN THE

# Supreme Court of the United States

OCTOBER TERM 1923

**Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.**

BENJAMIN GUINNESS, WALTER T. ROSEN, MORITZ ROSENTHAL, SIDNEY H. MARCH, RUDOLF METZ and HARRY B. LAKE, and ANNA THALMANN and MORITZ ROSENTHAL, as Trustees of the Estate of Ernst Thalmann, deceased, copartners doing business under the firm name and style of LADENBURG, THALMANN & CO.,
Petitioners,

AGAINST

THOMAS W. MILLER, as Alien Property Custodian, FRANK WHITE, as Treasurer of the United States and Carl Joerger, Gustaf Ratjen, Ludwig Korte, Arthur Freiherr von Schickler, Margarete Grafin von Pourtales, Estate of Ludwig Delbruck, deceased, copartners doing business under the firm name and style of Delbruck, Schickler & Company,
Respondents.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners Benjamin Guinness, Walter T. Rosen, Moritz Rosenthal, Sidney H. March, Rudolf

Metz and Harry B. Lake, and Anna Thalmann and Moritz Rosenthal, as Trustees of the Estate of Ernst Thalmann, Deceased, copartners doing business under the firm name and style of Ladenburg, Thalmann & Company, respectfully represent:

## Writ of Certiorari Applied for by Respondents.

FIRST: The respondents, Thomas W. Miller as Alien Property Custodian, and Frank White as Treasurer of the United States are likewise making application for a writ of certiorari in this cause. The petitioners herein concede that this cause is one of far reaching public importance in respect of the matters concerning which the said Alien Property Custodian and Treasurer of the United States seek a review; but they represent to the Court that there is another matter of equally wide reaching importance involved in this cause, concerning which the said Alien Property Custodian and Treasurer of the United States do not seek a review, because it was decided in their favor by the courts below, but which it is respectfully submitted ought to be reviewed together with the matters proposed for review by those respondents.

## Matters Involved in This Cause.

SECOND: The defendants constituting the firm of Delbruck, Schickler & Company (who did not appear or answer in this suit) owed to plaintiffs on December 31st, 1916 the sum of 1,079.35 German reichsmarks. This amount was not paid prior to the commencement of the war with Germany on April 6th, 1917. Pursuant to the provisions of

Section 9 of the Trading with the Enemy Act a notice of claim was filed against property of the defendants Delbrück, Schickler & Company seized by the Alien Property Custodian, and thereafter this suit was commenced under the provisions of Section 9 of the Trading with the Enemy Act to recover the amount of the debt with interest. It was conceded by the defendants, the Alien Property Custodian and the Treasurer of the United States, that they had funds of the alien enemy in their hands sufficient to pay the debt.

As the amount of the debt was admitted, and represented by a stated account, only two questions, and those of the most far reaching importance, were involved in this suit:

1. At what rate of exchange were the complainants entitled to recover from the Alien Property Custodian the debt originally expressed in German reichsmarks?

The Alien Property Custodian and the Treasurer of the United States contended that the correct rate of exchange was that existing on the date when judgment was entered, which was 1/25,000 of one cent for each reichsmark.

Both Courts below decided that the correct rate of exchange was the one existing at the time when the debt was created which was 18¼ cents for each reichsmark.

The judgment actually entered was at the rate of 17½ cents for each German reichsmark, because the complaint asked for judgment only in that amount—which is also the rate fixed by the Treaty of Versailles.

2. The second question involved is, shall interest be allowed on whatever amount may be recovered

between April 6, 1917 and July 14, 1919, the first date being that of the commencement of the war, and the second date being that when through proclamation of the President, trading with Germany again became lawful?

The Courts below have both held that interest for such period may not be recovered.

We deem this result to be erroneous, as being in conflict with the Treaty of Peace between Germany and the United States.

## The Importance of the Question Presented.

THIRD: It has been officially stated that the Alien Property Custodian has seized German property to the value of many hundred millions of dollars, and that claims for a large proportion of that amount have been made by American citizens in respect of prewar debts owing to them by the Germans whose property was seized.

The question presented in this case, of whether interest should be allowed on the debt owing by the German citizen from April 6th, 1917 to July 14th, 1919 is one which will arise necessarily, and is necessarily involved, in the case of every claim made against the Alien Property Custodian for the payment of a prewar debt owing by a German whose property has been seized by the Alien Property Custodian.

The case is not only of intrinsic importance as involving a large sum of money, in the aggregate, and as involving the decision and proper disposition of tens of thousands of similar claims, but it is important also because it involves the application of the provisions of the Treaty of Peace between the United States and Germany; because it is chiefly

in reliance upon the provisions of that Treaty that your petitioners claim that interest should be allowed.

**Grounds of Decision by Courts Below.**

FOURTH: The Courts below both held that at common law interest was not payable on a debt owing by an alien enemy during the period when he was not allowed to communicate with his creditor to pay the debt; and they further held that the terms of the Treaty of Peace did not alter this rule as applied to suits instituted under Section 9 of the Trading with the Enemy Act.

**Under the provisions of the Treaty of Peace between the United States and Germany interest must be allowed for the period of the war in suits brought under Section 9 of the Trading with the Enemy Act to recover pre-war debts.**

FIFTH: We believe that we have conclusively demonstrated the correctness of our contention in the brief annexed to our petition.

WHEREFORE your petitioners, who have no right to appeal to this Court, pray that this Court will be pleased to grant a writ of certiorari directed to the United States Circuit Court of Appeals for the Second Circuit requiring that Court to send a full and complete transcript of the record in the above entitled cause to this Court for its review and determination.

ALEXANDER B. SIEGEL,
Counsel for Petitioners.

STATE OF NEW YORK,
County of New York, } ss.:

ALEXANDER B. SIEGEL being duly sworn deposes and says: That he is counsel for the petitioners herein Benjamin Guinness, Walter T. Rosen, Moritz Rosenthal, Sidney H. March, Rudolf Metz and Harry B. Lake, and Anna Thalmann and Moritz Rosenthal, as Trustees of the Estate of Ernst Thalmann, deceased, copartners doing business under the firm name and style of Ladenburg, Thalmann & Co.; that he prepared the foregoing petition for a writ of certiorari; that the allegations of fact in said petition are true, as he is informed and verily believes, and that said petition, in his opinion, is well founded in law as well as in fact.

ALEXANDER B. SIEGEL,
Counsel for Petitioners.

Sworn to before me this 28th day of May, 1924.

JOHN HOWARD KEIM,
Notary Public,
New York County,
County Clerk's No. 71.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1923

BENJAMIN GUINNESS, *et al*, copartners doing business under the firm name and style of LADENBURG, THALMANN & Co.,

Petitioners

AGAINST

THOMAS W. MILLER, as Alien Property Custodian, FRANK WHITE, as Treasurer of the United States and Carl Joerger *et al*, copartners doing business under the firm name and style of Delbruck, Schickler & Company,

Respondents.

## INDEX OF ARGUMENT.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM 1923.

BENJAMIN GUINNESS, WALTER T. ROSEN, MORITZ ROSENTHAL, SIDNEY H. MARCH, RUDOLPH METZ and HARRY B. LAKE, and ANNA THALMANN and MORITZ ROSENTHAL, as Trustees of the Estate of Ernst Thalmann, Deceased, Copartners, doing business under the firm name and style of LADENBURG, THALMANN & COMPANY,

Petitioners,

AGAINST

THOMAS W. MILLER, as Alien Property Custodian, FRANK WHITE, as Treasurer of the United States, and CARL JOERGER, GUSTAF RATJEN, LUDWIG KORTE, ARTHUR FREIHERR VON SCHICKLER, MARGARETE GRAFIN VON POURTALES, ESTATE OF LUDWIG DELBRUCK, Deceased, Copartners, doing business under the firm name and style of DELBRUCK, SCHICKLER & COMPANY,

Respondents.

# BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

## Introduction.

This brief deals only with one question:

In a suit brought under the Trading with the Enemy Act, against the Alien Property Custodian

to recover a *pre-war debt owing by* a German National, whose property has been seized by the Alien Property Custodian, shall interest be allowed for the period between April 6, 1917 and July 14, 1919?

And, we limit the question still further by confining our brief to a discussion of whether such interest must be allowed pursuant to the terms of the Treaty of Peace between the United States and Germany.

## Provisions of the Treaty of Peace.

The Treaty of Peace with Germany was made pursuant to the Act of July 2, 1921, terminating the state of war between the United States and Germany. Section 2 of that Act provides as follows:

> "That in making this declaration, and as a part of it, there are expressly reserved to United States of America and its nationals, any and all rights, privileges, indemnities, reparations or advantages together with the right to enforce the same * * * which, under the Treaty of Versailles have been stipulated for its or their benefit."

The Treaty of Peace with Germany, of which ratifications were exchanged on November 11th, 1921, and which was proclaimed on November 14th, 1921, after reciting the above quoted provision of the Act of Congress, contains the following:

> "ARTICLE I.
>
> Germany undertakes to accord to the United States, and the United States shall have and enjoy, all the rights, privileges, indemnities, reparations or advantages specified in the aforesaid Joint Resolution of the Congress of the United States of July 2, 1921, including all

the rights and advantages stipulated for the benefit of the United States in the Treaty of Versailles which the United States shall fully enjoy notwithstanding the fact that such Treaty has not been ratified by the United States."

"ARTICLE II.

With a view to defining more particularly the obligations of Germany under the foregoing Article with respect to certain provisions in the Treaty of Versailles, it is understood and agreed between the High Contracting Parties:

(1) That the rights and advantages stipulated in that Treaty for the benefit of the United States, which it is intended the United States shall have and enjoy, are those defined in Section 1 of Part IV, and Parts V, VI, VIII, IX, X, XI, XII, XIV and XV.

The United States in availing itself of the rights and advantages stipulated in the provisions of that treaty mentioned in this paragraph will do so in a manner consistent with the rights accorded to Germany under such provisions."

The attention of the Court is respectfully invited also to the Resolution of the Senate of the United States of October 18, 1921—two-thirds of the senators present concurring therein—by which the Senate gave its advice and consent to the ratification of this treaty, subject to the understanding, made a part of the Resolution of Ratification:

"That the rights and advantages which the United States is entitled to have and enjoy under this Treaty embrace the rights and advantages of nationals of the United States specified in the Joint Resolution or in the provisions of the Treaty of Versailles, to which this Treaty refers."

## The Effect of the Treaty.

From these quotations it is clear, we submit, that it was the intention of Congress and of the Treaty Making Power to establish as law certain provisions of the Treaty of Versailles conferring benefits upon citizens of the United States with the same effect as if the Treaty of Versailles had been ratified by the United States Senate. The portions of the Treaty of Versailles thus incorporated as the law of the land by the Treaty of Peace with Germany are defined, as shown by the quotation above from Article II of the Treaty of Peace, and included within such definition is Part X of the Treaty of Versailles.

## The Specific Legal Question in this Case.

Neither the Alien Property Custodian nor the Circuit Court of Appeals have differed with us in our contention that Part X of the Treaty of Versailles is, by virtue of the Provisions of the Treaty of Peace between the United States and Germany, a part of the law of the land. It is our contention, not sustained by the Circuit Court of Appeals, that pursuant to the provisions of Part X of the Versailles Treaty, as incorporated in the Treaty of Peace, interest must be allowed on debts recovered pursuant to the provisions of Section 9 of the Trading with the Enemy Act.

## The Provisions of Part X of the Versailles Treaty.

Part X of the Versailles Treaty consists of a number of sections, of which only Sections III and IV have any applicability.

Section III refers to the collection of pre-war debts through an International Clearing Office to which any country may adhere or not at its election. The United States has not adhered to the International Clearing Office.

Section IV contains the provisions relating to "Property Rights and Interests". Among the matters covered by Section IV with clearness and directness, as it seems to us, are the property rights in connection with German property seized by an allied or associated power which has not adopted Section III relating to the International Clearing Office.

Section IV consists of two Articles, 297 and 298, and an Annex.

Sub-division 2 of paragraph (*h*) of Article 297 provides as follows (the portion omitted from the quotation being irrelevant, dealing with the obligation of Germany to restore allied property to the owners thereof):

> "(2) As regards Powers not adopting Section III and the Annex thereto, * * * *the proceeds of the property, rights and interests, and the cash assets, of German nationals received by an Allied or Associated Power* shall be subject to disposal by such Power in accordance with its laws and regulations and *may be applied in payment of the claims and debts defined by* this Article or *paragraph 4 of the Annex hereto.*"

Paragraph 4 of the Annex to Section IV is as follows:

> "All property, rights and interests of German nationals within the territory of any Allied or Associated Power and the net proceeds of their sale, liquidation or other dealing therewith may be charged by that Allied or Associated Power in the first place *with pay-*

> *ment of amounts due in respect of claims by the nationals of that Allied or Associated Power with regard to their property, rights and interests,* including companies and associations in which they are interested, in German territory, *or debts owing to them by German nationals,* and with payment of claims growing out of acts committed by the German Government or by any German authorities since July 31, 1914, and before that Allied or Associated Power entered into the war. The amount of such claims" (and this obviously refers to the "claims" for damages last above referred to) "may be assessed by an arbitrator appointed by Mr. Gustave Ador, if he is willing, or if no such appointment is made by him, by an arbitrator appointed by the Mixed Arbitral Tribunal provided for in Section VI."

These quotations establish beyond contradiction, it seems to us, that Part X of the Treaty of Versailles, which is concededly a part of the law of the land by incorporation into the Treaty between the United States and Germany, specifically refers to and establishes rules with respect to property rights in German property seized by the Alien Property Custodian.

What does it say about such property? It says:

(1) That such property shall be subject to disposition by the United States in accordance with its laws and regulations; and

(2) That it may be applied in payment of the claims and debts defined by paragraph 4 of the Annex to Section IV.

Among these claims and debts to which such property may be applied, there are listed in said paragraph 4 of the Annex to Section IV, debts owing to American nationals by German na-

tionals,—that is, debts recoverable pursuant to Section 9 of the Trading with the Enemy Act.

Do we find anything further in Part X in any manner defining such debts? We do; *and what we find is directly relevant to the question of whether interest should be allowed on such debts during the period of the war.*

Paragraph 14 of the Annex to Section IV provides as follows:

> "The provisions of Article 297 and this Annex, relating to property, rights and interests in an enemy country, and the proceeds of the liquidation thereof, apply to debts, credits and accounts. Section III regulating only the method of payment.
>
> *In the settlement of matters provided for in Article 297 between Germany and the Allied or Associated States,* their colonies or protectorates, or any one of the British Dominions or India, in respect of any of which a declaration shall not have been made that they adopt Section III, *and between their respective nationals, the provisions of Section III respecting the currency in which payment is to be made and the rate of exchange and of interest shall apply* unless the Government of the Allied or Associated Power concerned shall within six months of the coming into force of the present Treaty notify Germany that the said provisions are not to be applied."

Section IV, therefore, provides that in the settlement of matters provided for in Article 297 between Germany and the Allied or Associated States, *and between their respective nationals,* the provisions of Section III with respect to the rate of interest shall apply unless the Government of the Allied or Associated State concerned shall notify Germany to the contrary.

It is conceded, and it was shown in the Court below by an official letter from the Secretary of State, that no such notice has been given by the United States.

The property rights and interests referred to in Article 297 include claims against seized German property; any country which did not adhere to the provisions for the International Clearing Office had the option, nevertheless, of obtaining for its citizens the benefit of the specifications in Section III with respect to the currency in which payment of prewar debts should be made, the rate of exchange and the rate of interest. If it did not want *those* benefits, and wished to rely on other provisions, it must notify Germany; and the United States did not so notify Germany.

What does this mean? Clearly that to determine the rate of exchange and the rate of interest payable in respect of debts which are to be recovered under the regulations of the United States out of funds seized by the Allied Property Custodian we must look to the provisions of Section III, which, it is true, deals primarily with the recovery through the International Clearing Office, *but by reference is also made applicable to the settlement of pre-war debts in a country which chose to settle those debts itself,* if it did not give notice that it rejected those provisions; the intent of the United States, as evidenced by its failure to give the notice which it might have given, obviously being that so far as concerns the amount of the debt which may be recovered, this should be the same as if the United States had adhered to the International Clearing Office, *although it retained in its own hands the settlement of the debt and the property out of which it was payable.*

The provision for the rate of interest is found in sub-division 22 of the Annex to Section III, as follows:

> "The rate of interest shall be 5 per cent. per annum except in cases where, by contract, law or custom, the creditor is entitled to payment of interest at a different rate. In such cases the rate to which he is entitled shall prevail.
>
> *Interest shall run from the date of commencement of hostilities* (or, if the sum of money to be recovered fell due during the war, from the date at which it fell due) *until the sum is credited to the Clearing Office of the creditor.*"

*It is, therefore, specifically provided that so far as concerns the payment of debts out of property seized by the United States Government, interest shall run during the period of the war.*

The provisions of the Treaty of Versailles were designed so that each country could at its election adhere to the International Clearing Office, but whether it did so or not, the amount payable in respect of debts owing by and to private persons out of property seized by the Government should not vary (unless the government concerned specifically so notified Germany) by reason of its adherence or non-adherence to the Internationl Clearing Office. This gives the Treaty of Peace a construction which, we submit, is the only construction admitted by its terms; and which, moreover, accords with reason and logic.

## Conclusion.

The decision of the Circuit Court of Appeals for the Second Circuit on the question of interest was erroneous; and since this decision involves a matter of widespread importance affecting not only the parties hereto, but tens of thousands of persons who have filed claims with the Alien Property Custodian, pursuant to the provisions of the Trading with the Enemy Act, and involves also the correct construction of the Treaty between the United States and Germany, it is respectfully submitted that the Writ of Certiorari should issue as prayed.

ALEXANDER B. SIEGEL,
Of Counsel.